

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 SAN JOSE DIVISION

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

8 THE NEWARK GROUP, INC.

9 Defendant.

)
)
) CIVIL ACTION NO.
)
)
) JUDGE
)
)
)

10 **CONSENT DECREE**

11 **I. BACKGROUND**

12
13 A. The United States of America ("United States"), on behalf of the Administrator of the
14 United States Environmental Protection Agency ("EPA"), filed a Complaint in this matter against
15 The Newark Group, Inc. ("Settling Defendant") pursuant to Sections 106 and 107 of the
16 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.
17 §§ 9606, 9607, as amended ("CERCLA"), seeking, inter alia: (i) reimbursement of response costs
18 incurred or to be incurred for response actions taken or to be taken at or in connection with the
19 release or threatened release of hazardous substances at the Lorentz Barrel and Drum Superfund
20 Site in San Jose, Santa Clara County, California ("Site"), and (ii) performance of response work
21 by Settling Defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part
22 300 (as amended) ("NCP").

23 B. Settling Defendant does not admit any liability to Plaintiff arising out of the
24 transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or
25 threatened release of hazardous substance(s) at or from the Site constitutes an imminent or
26 substantial endangerment to the public health or welfare or the environment.

27 C. The decisions by EPA on the remedial actions to be implemented at the Site are
28 embodied in two Records of Decision ("RODs"): ROD 1, executed on September 21, 1988, and

Consent Decree

1 ROD 2, executed on August 26, 1993. The State of California, through the Department of Toxic
2 Substances Control, has given its concurrence to the remedial actions embodied in the RODs.
3 The RODs include summaries of EPA's responses to public comments. Notice of the final plans
4 were published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

5 D. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C.
6 § 9621(f)(1)(F), EPA notified the State of California, thorough the Department of Toxic
7 Substances Control ("DTSC"), of negotiations with potentially responsible parties regarding
8 implementation of the remedial design and remedial action for the Site, and EPA has provided
9 DTSC with an opportunity to participate in such negotiations and be a party to this Consent
10 Decree.

11 E. The United States and Settling Defendant agree, and this Court by entering this
12 Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith,
13 that settlement of this matter will avoid prolonged and complicated litigation between the Parties,
14 and that this Consent Decree is fair, reasonable, and in the public interest.

15 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,
16 ADJUDGED, AND DECREED:

17 **II. JURISDICTION**

18 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
19 §§ 1331 and 1345 and 42 U.S.C. §§ 9606, 9607, 9613(b), and also has personal jurisdiction over
20 Settling Defendant. Solely for the purposes of this Consent Decree and the underlying
21 Complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction
22 of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this
23 Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

24 **III. PARTIES BOUND**

25 2. This Consent Decree is binding upon the United States, and upon Settling Defendant
26 and its successors and assigns. Except if agreed to in the future by EPA under Paragraph 7c, any
27 change in ownership or corporate or other legal status including, but not limited to, any transfer
28 of assets or real or personal property, shall in no way alter the status or responsibilities of Settling

1 Defendant under this Consent Decree.

2 **IV. DEFINITIONS**

3 3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are
4 defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings
5 assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in
6 this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

7 "CERCLA" shall mean the Comprehensive Environmental Response,
8 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.*

9 "Complaint" shall mean the pleading United States v. The Newark Group, Inc.,
10 filed concurrently with this Consent Decree and bearing the same Civil Action Number.

11 "Consent Decree" shall mean this Consent Decree and all appendices attached
12 hereto.

13 "Day" shall mean a calendar day unless expressly stated to be a working day.

14 "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In
15 computing any period of time under this Consent Decree, where the last day would fall on a
16 Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next
17 working day.

18 "DOJ" shall mean the United States Department of Justice and any of its
19 successor departments, agencies, or instrumentalities.

20 "DTSC" shall mean the California Department of Toxic Substances Control and
21 any of its successor departments or agencies.

22 "Effective Date" shall be the date upon which this Consent Decree is entered by
23 the Court, except as otherwise provided herein.

24 "EPA" shall mean the United States Environmental Protection Agency and any of
25 its successor departments, agencies, or instrumentalities.

26 "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance
27 Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

28 "Future Response Costs" shall mean all costs, including but not limited to direct

1 and indirect costs, that the United States incurs pursuant to Paragraph 45 of Section XIII (Work
2 Takeover).

3 "Interest" shall mean interest at the rate specified for interest on investments of
4 the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded
5 annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate
6 of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject
7 to change on October 1 of each year.

8 "National Contingency Plan" or "NCP" shall mean the National Oil and
9 Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of
10 CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, and any amendments thereto.

11 "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic
12 numeral or an upper or lower case letter.

13 "Past Response Costs" shall mean all costs, including, but not limited to, direct
14 and indirect costs, that the United States paid at or in connection with the Site through the
15 Effective Date.

16 "Parties" shall mean the United States and Settling Defendant.

17 "Plaintiff" shall mean the United States.

18 "Property" shall mean that portion of the Site, encompassing approximately 1.47
19 acres, formerly owned by Arata-Western, Inc., and currently owned by Settling Defendant, which
20 is generally shown on the map included in Appendix A to this Consent Decree.

21 "RCRA" shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* (also
22 known as the Resource Conservation and Recovery Act).

23 "ROD 1" shall mean the EPA Record of Decision relating to Operable Unit 2 at
24 the Site signed on September 21, 1988, by the Regional Administrator, EPA Region IX, as
25 amended, and all attachments thereto.

26 "ROD 2" shall mean the EPA Record of Decision relating to Operable Unit 1 at
27 the Site signed on August 26, 1993, by the Regional Administrator, EPA Region IX, as amended,
28 and all attachments thereto.

1 "Section" shall mean a portion of this Consent Decree identified by a Roman
2 numeral.

3 "Settling Defendant" shall mean The Newark Group, Inc. and its corporate
4 successors and assigns.

5 "Site" shall mean the Lorentz facility Superfund site, encompassing
6 approximately 6.72 acres, located at 1515 South Tenth Street in San Jose, Santa Clara County,
7 California, and generally shown on the map included in Appendix B.

8 "State" shall mean the State of California.

9 "Statement of Work" or "SOW" shall mean the statement of work set forth in
10 Appendix C to this Consent Decree and any modifications to Appendix C made in accordance
11 with this Consent Decree.

12 "United States" shall mean the United States of America, including its
13 departments, agencies and instrumentalities, including, without limitation EPA.

14 "Work" shall mean all activities Settling Defendant is required to perform under
15 this Consent Decree, except those required by Section XVI (Retention of Records).

16 **V. GENERAL PROVISIONS**

17 4. **Objectives of the Parties.** The objectives of the Parties in entering into this
18 Consent Decree are to protect public health or welfare or the environment at the Site by the
19 implementation of response actions at the Site by the Settling Defendant, to reimburse response
20 costs of the Plaintiff, and to resolve the claims of Plaintiff against Settling Defendant as provided
21 in Sections XII through XIV of this Consent Decree.

22 5. **Commitments by Settling Defendant.** Settling Defendant shall finance and
23 perform the Work in accordance with this Consent Decree, the RODs, the SOW and all work
24 plans and other plans developed by Settling Defendant and approved by EPA pursuant to this
25 Consent Decree. Settling Defendant shall also reimburse the United States for Past Response
26 Costs and Future Response Costs as provided in this Consent Decree.

27 6. **Compliance With Applicable Law.** All activities undertaken by Settling
28 Defendant pursuant to this Consent Decree shall be performed in accordance with the

1 requirements of all applicable Federal and state laws and regulations. Settling Defendant must
2 also comply with all applicable or relevant and appropriate requirements of all Federal and state
3 environmental laws as set forth in the RODs and the SOW. The activities conducted pursuant to
4 this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

5 7. Notice to Successors-in-Title.

6 a. Within 15 days after the entry of this Consent Decree, Settling Defendant
7 shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Santa
8 Clara County, State of California, which shall provide notice to all successors-in-title that the
9 Property is part of the Site, and that Settling Defendant has entered into a Consent Decree
10 requiring implementation of a portion of the remedy. Such notice shall identify the United States
11 District Court in which the Consent Decree was filed, the name and civil action number of this
12 case, and the date the Consent Decree was entered by the Court. Settling Defendant shall record
13 the notice within 10 days of EPA's approval of the notice. Settling Defendant shall provide EPA
14 with a certified copy of the recorded notice within 10 days of recording such notice.

15 b. At least 30 days prior to the conveyance of any interest in the Property
16 including but not limited to fee interests, leasehold interests, and mortgage interests, Settling
17 Defendant shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by
18 which an interest in real property has been conveyed that confers a right of access to the Property
19 (hereinafter referred to as "access easements") pursuant to Section VII (Access and Institutional
20 Controls), and (iii) any instrument by which an interest in real property has been conveyed that
21 confers a right to enforce restrictions on the use of the Property (hereinafter referred to as
22 "restrictive easements") pursuant to Section VII (Access and Institutional Controls). At least 30
23 days prior to such conveyance, Settling Defendant shall also give written notice to EPA and
24 DTSC of the proposed conveyance, including the name and address of the grantee, and the date
25 on which notice of the Consent Decree, access easements, or restrictive easements was given to
26 the grantee.

27 c. In the event of any conveyance of any interest in the Property, the Settling
28 Defendant's obligations under this Consent Decree, including but not limited to its obligation to

1 provide or secure access and institutional controls, as well as to abide by such institutional
2 controls, pursuant to Section VII (Access and Institutional Controls) of this Consent Decree, shall
3 continue to be met by Settling Defendant. In no event shall such conveyance release or otherwise
4 affect the liability of Settling Defendant to comply with all provisions of this Consent Decree,
5 absent the prior written consent of EPA. If the United States approves, the grantee may perform
6 some or all of the Work under this Consent Decree.

7 **VI. PERFORMANCE OF WORK BY SETTLING DEFENDANT**

8 8. Settling Defendant shall implement the SOW, including all inspection,
9 maintenance, and reporting requirements contained therein. Within 30 days of the Effective Date
10 of this Consent Decree, Settling Defendant shall begin implementing the SOW. Within 90 days
11 of the Effective Date of this Consent Decree, Settling Defendant shall submit the initial Routine
12 Status Report as required by the SOW.

13 9. Within 60 days of the Effective Date of this Consent Decree, Settling Defendant
14 shall submit to EPA its Property Maintenance Plan and Emergency Response Plan as provided by
15 the SOW.

16 **10. Modification of the SOW or Related Work Plans**

17 a. If EPA determines that modification to the work specified in the SOW
18 or in work plans developed pursuant to the SOW is necessary to maintain the effectiveness of the
19 remedy set forth in the RODs, EPA may require that such modification be incorporated in the
20 SOW or such work plans; provided, however, that a modification may only be required pursuant
21 to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the
22 RODs.

23 b. If Settling Defendant objects to any modification determined by EPA to be
24 necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section X
25 (Dispute Resolution). The SOW or related work plans shall be modified in accordance with the
26 final resolution of the dispute.

27 c. Settling Defendant shall implement any work required by any
28 modifications incorporated in the SOW or in work plans developed pursuant to the SOW in

1 accordance with this Paragraph.

2 d. Nothing in this Paragraph shall be construed to limit EPA's authority to
3 require performance of further response actions as otherwise provided in this Consent Decree.

4 **VII. ACCESS AND INSTITUTIONAL CONTROLS**

5 11. Commencing on the date of lodging of this Consent Decree, Settling Defendant
6 shall provide the United States and its representatives, including EPA and its contractors, with
7 access at all reasonable times to the Property, for the purpose of conducting any activity related
8 to this Consent Decree, and the RODs, including but not limited to the following activities:

- 9 a. Monitoring the Work
10 b. Verifying any data or information submitted to the United States
11 c. Conducting inspections of the Property
12 d. Implementing the Work pursuant to the conditions set forth in Paragraph
13 45 of this Consent Decree

- 14 e. Assessing Settling Defendant's compliance with this Consent Decree
15 f. Determining whether the Property is being used in a manner that is
16 prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this
17 Consent Decree

18 12. Commencing on the date of lodging of this Consent Decree, Settling Defendant
19 shall refrain from using the Property in any manner that would interfere with or adversely affect
20 the implementation, integrity, or protectiveness of the remedial measures to be performed
21 pursuant to the RODs.

22 13. a. Settling Defendant shall execute and record in the Recorder's Office of
23 Santa Clara County, State of California, a Covenant to Restrict Use of Property, Environmental
24 Restriction, identical to the form attached hereto as Appendix D. Within 15 days of entry of this
25 Consent Decree, Settling Defendant shall provide to EPA, for its review and approval, a current
26 title insurance commitment or other evidence of title acceptable to EPA that shows title to the
27 Property to be free and clear of all prior liens and encumbrances (except when those liens or
28 encumbrances are approved by EPA, or when, despite its best efforts, Settling Defendant is

1 unable to obtain release or subordination of such prior liens or encumbrances). Within 15 days
2 of EPA's approval and acceptance of the title evidence, Settling Defendant shall update the title
3 search and, if it is determined that nothing has occurred since the effective date of the
4 commitment to affect the title adversely, Settling Defendant shall record the Covenant to Restrict
5 Use of Property, Environmental Restriction with the Recorder's Office of Santa Clara County.

6 b. Within 30 days of recording the Covenant to Restrict Use of Property,
7 Environmental Restriction, Settling Defendant shall provide EPA with a final title insurance
8 policy, or other final evidence of title acceptable to EPA, and a certified copy of the original
9 recorded Covenant to Restrict Use of Property, Environmental Restriction, showing the clerk's
10 recording stamps.

11 14. Notwithstanding any provision of this Consent Decree, the United States retains
12 all of its access authorities and rights, as well as its rights to require land or water use restrictions,
13 including enforcement authorities related thereto, under CERCLA, RCRA and any other
14 applicable statute or regulation.

15 **VIII. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

16 15. After review of any plan, report or other item that is required to be submitted
17 pursuant to this Consent Decree, EPA shall: (a) approve, in whole or in part, the submission; (b)
18 approve the submission upon specified conditions; (c) modify the submission to cure the
19 deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling
20 Defendant modify the submission; or (e) any combination of the above. However, EPA shall not
21 modify a submission without first providing Settling Defendant at least one notice of deficiency
22 and an opportunity to cure within 15 days, except where a previous submission or submissions
23 have been disapproved due to material defects and the deficiencies in the submission or
24 submissions under consideration indicate a bad faith lack of effort to submit an acceptable
25 deliverable.

26 16. In the event of approval, approval upon conditions, or modification by EPA,
27 pursuant to Paragraph 15(a), (b), or (c), Settling Defendant shall proceed to take any action
28 required by the plan, report, or other item as approved or modified by EPA, subject only to its

1 right to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution) with
2 respect to the modifications or conditions made by EPA. In the event that EPA modifies the
3 submission to cure deficiencies pursuant to Paragraph 15 (c) and the submission has a material
4 defect, EPA retains its right to seek Stipulated Penalties, as provided in Section XI (Stipulated
5 Penalties).

6 17. Re-submission of Plans.

7 a. Upon receipt of a notice of disapproval pursuant to Paragraph 15 (d),
8 Settling Defendant shall, within 15 days or such longer time as specified by EPA in such notice,
9 correct the deficiencies and resubmit the plan, report, or other item for approval.

10 b. Notwithstanding the receipt of a notice of disapproval pursuant to
11 Paragraph 15(d), Settling Defendant shall proceed, at the direction of EPA, to take any action
12 required by any non-deficient portion of the submission. Implementation of any non-deficient
13 portion of a submission shall not relieve Settling Defendant of any liability for Stipulated
14 Penalties under Section XI (Stipulated Penalties).

15 18. In the event that a resubmitted plan, report or other item, or portion thereof, is
16 disapproved by EPA, EPA may again require the Settling Defendant to correct the deficiencies,
17 in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the
18 plan, report or other item. Settling Defendant shall implement any such plan, report, or item as
19 modified or developed by EPA, subject only to its right to invoke the procedures set forth in
20 Section X (Dispute Resolution).

21 19. If upon re-submission, a plan, report, or item is disapproved or modified by EPA
22 due to a material defect, Settling Defendant shall be deemed to have failed to submit such plan,
23 report, or item timely and adequately, unless Settling Defendant invokes the dispute resolution
24 procedures set forth in Section X (Dispute Resolution), and EPA's action is overturned pursuant
25 to that Section. The provisions of Section X (Dispute Resolution) and Section XI (Stipulated
26 Penalties) shall govern the implementation of the Work and accrual and payment of any
27 Stipulated Penalties during Dispute Resolution. If EPA's disapproval or modification is upheld,
28 Stipulated Penalties shall accrue for such violation from the date on which the initial submission

1 was originally required, as provided in Section XI (Stipulated Penalties).

2 20. All plans, reports, and other items required to be submitted to EPA under this
3 Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent
4 Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required
5 to be submitted to EPA under this Consent Decree, the approved or modified portion shall be
6 enforceable under this Consent Decree.

7 **IX. PAYMENT FOR RESPONSE COSTS**

8 21. **Payment for Past Response Costs**

9 a. Within 30 days of the Effective Date of this Consent Decree, Settling
10 Defendant shall pay to EPA \$15,000. Payment shall be made by FedWire Electronic Funds
11 Transfer ("EFT") to the U.S. Department of Justice account in accordance with EFT
12 instructions. These instructions shall be provided to Settling Defendant, following lodging of the
13 Consent Decree, by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern
14 District of California.

15 b. At the time of payment, Settling Defendant shall also send notice that
16 payment has been made to EPA and DOJ in accordance with Section XVII (Notices and
17 Submissions). Such notice shall reference the EPA Region and Site-Spill ID Number 0989,
18 DOJ Case Number 90-11-2-467/5, and the civil action number of this case.

19 c. The total amount to be paid by Settling Defendant pursuant to Paragraph
20 21.a shall be deposited by the United States in the Lorentz Special Account within the EPA
21 Hazardous Substance Superfund to be retained and used to conduct or finance response actions at
22 or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance
23 Superfund.

24 22. **Payments for Future Response Costs.**

25 a. In the event of a Work Takeover by EPA pursuant to Paragraph 45,
26 Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National
27 Contingency Plan. On a periodic basis the United States will send Settling Defendants a bill
28 requiring payment that includes a SCORPIOS cost summary. Settling Defendant shall make all

1 payments within 30 days of Settling Defendant's receipt of each bill requiring payment, except as
2 otherwise provided in Paragraph 23. Settling Defendant shall make all payments required by this
3 Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous
4 Substance Superfund," referencing the name and address of the party making the payment, EPA
5 Site/Spill ID Number 0989, DOJ Case Number 90-11-2467/5, and the civil action number of this
6 case. Settling Defendant shall send the check(s) to:

7 EPA - Cincinnati Accounting Operations
8 Attention: Region 9 Receivables
9 P.O. Box 371099M
Pittsburgh, PA 15251

10 b. At the time of payment, Settling Defendants shall send notice that payment
11 has been made to the United States, to EPA and to the Regional Financial Management Officer,
12 in accordance with Section XVII (Notices and Submissions).

13 c. The total amount to be paid by Settling Defendant pursuant to Paragraph
14 22.a shall be deposited by the United States in the Lorentz Special Account within the EPA
15 Hazardous Substance Superfund to be retained and used to conduct or finance response actions at
16 or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance
17 Superfund.

18 23. Settling Defendant may contest payment of any Future Response Costs under
19 Paragraph 22 if it determines that the United States has made an accounting error or if it alleges
20 that a cost item that is included represents costs that are inconsistent with the NCP. Such
21 objection shall be made in writing within 30 days of receipt of the contested bill and must be sent
22 to the United States pursuant to Section XVII (Notices and Submissions). Any such objection
23 shall specifically identify the contested Future Response Costs and the basis for objection. In the
24 event of an objection, Settling Defendant shall within the 30 day period pay all uncontested
25 Future Response Costs to the United States in the manner described in Paragraph 22.
26 Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a
27 federally-insured bank duly chartered in the State of California and remit to that escrow account
28 funds equivalent to the amount of the contested Future Response Costs. Settling Defendant shall

1 send to the United States, as provided in Section XVII (Notices and Submissions), a copy of the
2 transmittal letter and the check remitting the uncontested Future Response Costs, together with a
3 copy of the correspondence that establishes and funds the escrow account, which shall include
4 information containing the identity of the bank and bank account under which the escrow account
5 is established as well as a bank statement showing the initial balance of the escrow account.
6 Simultaneously with establishment of the escrow account, Settling Defendant shall initiate the
7 dispute resolution procedures in Section X (Dispute Resolution). If the United States prevails in
8 the dispute, within 5 days of the resolution of the dispute, Settling Defendant shall pay the sums
9 due (with accrued Interest) to the United States in the manner described in Paragraph 22. If
10 Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall
11 pay all contested costs (plus associated accrued Interest) as to which it did not prevail to the
12 United States in the manner described in Paragraph 22; Settling Defendant shall be disbursed any
13 balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in
14 conjunction with the procedures set forth in Section X (Dispute Resolution) shall be the
15 exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to
16 reimburse the United States for its Future Response Costs.

17 24. In the event that the payments required by Subparagraph 21.a are not made within
18 30 days of the Effective Date, or the payments required by Paragraph 22.a are not made within 30
19 days of the Settling Defendant's receipt of the bill requiring payment, Settling Defendant shall
20 pay Interest on the unpaid balance. Interest to be paid on Past Response Costs under this
21 Paragraph shall begin to accrue on the Effective Date. Interest on Future Response Costs shall
22 begin to accrue on the date of the bill for those costs. Interest shall accrue through the date of
23 Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in
24 addition to such other remedies or sanctions available to Plaintiff by virtue of Settling
25 Defendant's failure to make timely payments under this Section, including but not limited to
26 payment of Stipulated Penalties pursuant to Paragraph 28. Settling Defendant shall make all
27 payments required by this Paragraph in the manner described in Paragraph 22.

X. DISPUTE RESOLUTION

25. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

26. Any dispute that arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other a written Notice of Dispute.

27. **Statement of Position.**

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including but not limited to any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Settling Defendant.

b. Following receipt of Settling Defendant's Statement of Position submitted pursuant to Paragraph 27.a, the Director of the Superfund Division, EPA Region IX, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on Settling Defendant unless, within 10 days of receipt of the decision, Settling Defendant files with the Court and serves on the United States a motion for judicial review of the decision, setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's motion.

c. The invocation of formal dispute resolution procedures under this Section

1 shall not extend, postpone, or affect in any way any obligation of Settling Defendant under this
2 Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated
3 Penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed
4 pending resolution of the dispute as provided in Paragraph 37. Notwithstanding the stay of
5 payment, Stipulated Penalties shall accrue from the first day of noncompliance with any
6 applicable provision of this Consent Decree. In the event that Settling Defendant does not
7 prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in
8 Section XI (Stipulated Penalties).
9

10 **XI. STIPULATED PENALTIES**

11 28. If any amounts due under Paragraphs 21.a and 22.a are not paid by the required
12 date, Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated
13 penalty, in addition to the interest required by Paragraph 24, \$5,000 for each day that payment is
14 late.

15 29. **Stipulated Penalty Amounts – Work**

16 The following Stipulated Penalties shall accrue per violation per day for failure to timely
17 perform any routine or emergency maintenance work required under the SOW:

18 <u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
19 \$1,000	1 st through 14 th day
20 \$2,000	15 th through 30 th day
21 \$3,000	31 st day and beyond.

22 30. **Stipulated Penalty Amounts – Reports.**

23 The following Stipulated Penalties shall accrue per violation per day for failure to submit
24 timely or adequate reports pursuant to Paragraphs 8, 9, 17, and 18:

25 <u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
26 \$500	1 st through 14 th day
27 \$1,000	15 th through 30 th day
28 \$1,500	31 st day and beyond.

1 31. In the event that EPA assumes performance of a portion or all of the Work
2 pursuant to Paragraph 45 of Section XIII (Work Takeover), Settling Defendant shall be liable for
3 a stipulated penalty in the amount of \$50,000.

4 32. All penalties shall begin to accrue on the day after the complete performance is
5 due or a violation occurs and shall continue to accrue through the final day of the correction of
6 the noncompliance or completion of the activity. However, Stipulated Penalties shall not accrue:
7 (1) with respect to a deficient submission under Section VIII (EPA Approval of Plans and Other
8 Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such
9 submission until the date that EPA notifies Settling Defendant of any deficiency; (2) with respect
10 to a decision by the Director of the Superfund Division, EPA Region IX, under Paragraph 27.b of
11 Section X (Dispute Resolution), during the period, if any, beginning on the 21st day after the date
12 that Settling Defendant's Statement of Position is received until the date that the Director issues a
13 final decision regarding such dispute; or (3) with respect to judicial review by this Court of any
14 dispute under Section X (Dispute Resolution), during the period, if any, beginning on the 31st
15 day after the Court's receipt of the final submission regarding the dispute until the date that the
16 Court issues a final decision regarding such dispute. Nothing herein shall prevent the
17 simultaneous accrual of separate penalties for separate violations of this Consent Decree.

18 33. All penalties accruing under this Section shall be due and payable to the United
19 States within 30 days of Settling Defendant's receipt from EPA of a demand for payment of the
20 penalties, unless Settling Defendant invokes the dispute resolution procedures under Section X
21 (Dispute Resolution). All payments to EPA under this Paragraph shall be identified as
22 "Stipulated Penalties" and shall be made by certified or cashier's check made payable to "EPA
23 Hazardous Substance Superfund." The check, or a letter accompanying the check, shall
24 reference the name and address of the party making payment, the Site name, the EPA Region and
25 Site Spill ID Number 0989, DOJ Case Number 90-11-2-467/5, and the civil action number of
26 this case. Settling Defendant shall send the check (and any accompanying letter) to:

27 EPA - Cincinnati Accounting Operations
28 P.O. Box 371099M
 Pittsburgh, PA 15251
 Attention: Region 9 Superfund Site Collections Officer

1 Or if by overnight mail, then to:

2 Mellon Client Service Center
3 Attention : Government Supervisor (371099)
4 Room 0690
5 500 Ross Street
6 Pittsburgh, PA 15262
7 Phone # 412- 234-5805

8 34. At the time of each payment of a Stipulated Penalty, Settling Defendant shall also
9 send notice that such payment has been made to EPA and DOJ in accordance with Section XVII
10 (Notices and Submissions) . Such notice shall reference the EPA Region and Site/Spill Id
11 Number 0989, DOJ Case Number 90-11-2-467/5, and the civil action number of this case.

12 35. Payment of Stipulated Penalties shall not excuse Settling Defendant from any
13 payment required by Section IX or from performance of any other requirements of this Consent
14 Decree.

15 36. Stipulated Penalties shall accrue as provided in this Paragraph regardless of
16 whether EPA has notified Settling Defendant of any violation or made a demand for payment,
17 but need only be paid upon demand.

18 37. Stipulated Penalties shall continue to accrue as provided in Paragraph 32 during
19 any dispute resolution period, but need not be paid until the following:

20 a. if the dispute is resolved by agreement or by a decision of EPA that is not
21 appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15
22 days of the agreement or the receipt of EPA's decision or order;

23 b. if the dispute is appealed to this Court and the United States prevails in
24 whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be
25 owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in
26 Paragraph 37.c, below;

27 c. if the District Court's decision is appealed by any Party, Settling
28 Defendant shall pay all accrued penalties determined by the District Court to be owing to the
United States into an interest-bearing escrow account within 60 days of receipt of the Court's

1 decision or order. Penalties shall be paid into this account as they continue to accrue, at least
2 every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent
3 shall pay the balance of the account to EPA or to Settling Defendant in accordance with the
4 Court's mandate.

5 38. If Settling Defendant fails to pay Stipulated Penalties when due, the United States
6 may institute proceedings to collect the penalties, as well as Interest. Settling Defendant shall
7 pay Interest on the unpaid balance, which shall begin to accrue on the date demand is made
8 pursuant to Paragraph 33.

9 39. If the United States brings an action to enforce this Consent Decree, and the
10 United States prevails in such action, Settling Defendant shall reimburse the United States for all
11 costs of such action, including but not limited to costs of attorney time.

12 40. Payments made under this Section shall be in addition to any other remedies or
13 sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the
14 requirements of this Consent Decree.

15 41. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in
16 any way limiting the ability of the United States to seek any other remedies or sanctions available
17 by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and
18 regulations upon which it is based, including but not limited to penalties pursuant to Section 122
19 (l) of CERCLA; provided, however, that the United States shall not seek civil penalties pursuant
20 to Section 122 (l) of CERCLA for any violation for which a stipulated penalty is provided herein,
21 except in the case of a willful violation of the Consent Decree.

22 42. Notwithstanding any other provision of this Section, the United States may, in its
23 unreviewable discretion, waive payment of any portion of the Stipulated Penalties that have
24 accrued pursuant to this Consent Decree.

25 **XII. COVENANT BY PLAINTIFF**

26 43. Covenant Not to Sue Settling Defendant by United States. Except as specifically
27 provided in Section XIII (Reservation of Rights by United States), the United States covenants
28 not to sue or to take administrative action against Settling Defendant pursuant to Sections 106

1 and 107(a) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), or pursuant to Section 7003 of RCRA, 42
2 U.S.C. § 6973, with regard to the Site. This covenant not to sue shall take effect upon receipt by
3 EPA of all payments from Settling Defendant required by Paragraph 21.a of Section IX (Payment
4 of Response Costs) and any amount due under Section XI (Stipulated Penalties). This covenant
5 not to sue is conditioned upon the satisfactory performance by Settling Defendant of its
6 obligations under this Consent Decree. This covenant not to sue extends only to Settling
7 Defendant and does not extend to any other person.

8 **XIII. RESERVATION OF RIGHTS BY UNITED STATES**

9 44. **General Reservations of Rights by United States.** The United States reserves, and
10 this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to
11 all matters not expressly included within the Covenant by Plaintiff in Paragraph 43.
12 Notwithstanding any other provision of this Consent Decree, the United States reserves all rights
13 against Settling Defendant with respect to:

14 a. claims based on a failure by Settling Defendant to meet a requirement of this
15 Consent Decree;

16 b. criminal liability;

17 c. liability for damages for injury to, destruction of, or loss of natural resources,
18 and for the costs of any natural resource damage assessments;

19 d. liability based upon Settling Defendant's transportation, treatment, storage, or
20 disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous
21 substance or a solid waste, at or in connection with the Site, after signature of this Consent
22 Decree by Settling Defendant;

23 e. liability arising from the past, present, or future disposal, release or threat of
24 release of a hazardous substance, pollutant, or contaminant, other than at the Site.

25 44.1 Notwithstanding any other provision of this Consent Decree, the United States
26 reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this
27 action or in a new action, or to issue an administrative order, seeking to compel Settling
28 Defendant (1) to perform response actions relating to the Site, or (2) to reimburse the United

1 States for additional costs of response if:

- 2 (i) conditions at the Site, previously unknown to EPA, are discovered, or
3 (ii) information, previously unknown to EPA, is received, in whole or in part,
4 and EPA determines that these previously unknown conditions or information, together with any
5 other relevant information, indicates that the remedial actions specified in the RODs are not
6 protective of human health or the environment.

7 44.2. For purposes of Paragraph 44.1, the information and the conditions known to EPA
8 regarding the Site shall include only that information and those conditions known to EPA as of
9 the date of issuance of the most recent Five-Year Review Report for the Site, dated September
10 27, 2000, and as set forth in the September 27, 2000 Five-Year Review Report, in the RODs for
11 the Site, and in the administrative record supporting the RODs.

12 45. Work Takeover. In the event EPA determines that Settling Defendant has ceased
13 implementation of any portion of the Work, is seriously or repeatedly deficient or late in its
14 performance of the Work, or is implementing the Work in a manner that may cause an
15 endangerment to human health or the environment, EPA may assume the performance of all or
16 any portions of the Work as EPA determines necessary. Settling Defendant may invoke the
17 procedures set forth in Section X (Dispute Resolution) to dispute EPA's determination that
18 takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in
19 performing the Work pursuant to this Paragraph shall be considered Future Response Costs that
20 Settling Defendant shall pay pursuant to Section IX (Payment for Response Costs).

21 46. Notwithstanding any other provision of this Consent Decree, the United States
22 retains all authority and reserves all rights to take any and all response actions authorized by law.

23 **XIV. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

24 47. Settling Defendant covenants not to sue and agrees not to assert any claims or
25 causes of action against the United States, or its contractors or employees, with respect to the Site
26 or this Consent Decree, including but not limited to:

- 27 a. any direct or indirect claim for reimbursement from the Hazardous Substance
28 Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§

1 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law;

2 b. any claim arising out of response actions at or in connection with the Site,
3 including any claim under the United States Constitution; the Tucker Act, 28 U.S.C. § 1491; the
4 Equal Access to Justice Act, 28 U.S.C. § 2412, as amended; or at common law; or

5 c. any claim against the United States pursuant to Sections 107 and 113 of
6 CERCLA, 42 U.S.C. §§ 9607, 9613, relating to the Site.

7 48. Except as provided in Paragraphs 50 and 54, these covenants not to sue shall not
8 apply in the event the United States brings a cause of action or issues an order pursuant to the
9 reservations set forth in Paragraph 44 (c) - (e), or Paragraph 44.1, but only to the extent that
10 Settling Defendant's claims arise from the same response action, response costs, or damages that
11 the United States is seeking pursuant to the applicable reservation.

12 49. Nothing in this Consent Decree shall be deemed to constitute approval or
13 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
14 40 C.F.R. § 300.700(d).

15 50. Settling Defendant agrees not to assert any claims and to waive all claims or causes
16 of action that it may have for all matters relating to the Site, including for contribution, against
17 any person that has entered into a final CERCLA § 122(g) *de minimis* settlement with EPA with
18 respect to the Site as of the Effective Date of this Consent Decree. This waiver shall not apply
19 with respect to any defense, claim, or cause of action that Settling Defendant may have against
20 any person if such person asserts a claim or cause of action relating to the Site against Settling
21 Defendant.

22 **XV. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

23 51. Except as provided in Paragraph 50, nothing in this Consent Decree shall be
24 construed to create any rights in, or grant any cause of action to, any person not a Party to
25 this Consent Decree. The preceding sentence shall not be construed to waive or nullify any
26 rights that any person not a signatory to this Decree may have under applicable law. Except
27 as provided in Paragraph 50, the Parties each expressly reserve any and all rights
28 (including, but not limited to, any right to contribution), defenses, claims, demands, and

1 causes of action that each Party may have with respect to any matter, transaction, or
2 occurrence relating in any way to the Site against any person not a Party hereto.

3 52. The Parties agree, and by entering this Consent Decree this Court finds, that
4 Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection
5 from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42
6 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters
7 addressed" in this Consent Decree are all response actions taken or to be taken and all
8 response costs incurred or to be incurred, at or in connection with the Site, by the United
9 States or any other person. The "matters addressed" in this Consent Decree do not include
10 those response costs or response actions as to which the United States has reserved its
11 rights under this Consent Decree (except for claims for failure to comply with this Decree),
12 in the event that the United States asserts rights against Settling Defendant coming within
13 the scope of such reservations.

14 53. Settling Defendant agrees that, with respect to any suit or claim for
15 contribution brought by it for matters related to this Consent Decree, it will notify EPA and
16 DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling
17 Defendant also agrees that, with respect to any suit or claim for contribution brought
18 against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing
19 within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant
20 shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary
21 Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for
22 matters related to this Consent Decree.

23 54. In any subsequent administrative or judicial proceeding initiated by the
24 United States for injunctive relief, recovery of response costs, or other relief relating to the
25 Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based
26 upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-
27 splitting, or other defenses based upon any contention that the claims raised by the United
28 States in the subsequent proceeding were or should have been brought in the instant case;

1 provided, however, that nothing in this Paragraph affects the enforceability of the Covenant
2 by Plaintiff set forth in Section XII.

3 **XVI. RETENTION OF RECORDS**

4 55. Until 3 years after the entry of this Consent Decree, Settling Defendant shall
5 preserve and retain all records, reports, or information (hereinafter referred to as "records")
6 now in its possession or control, or which come into its possession or control, that relate in
7 any manner to response actions taken at the Site or the liability of any person for response
8 actions or response costs at or in connection with the Site, regardless of any corporate
9 retention policy to the contrary.

10 56. After the conclusion of the 3-year document retention period set forth in the
11 preceding Paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to
12 the destruction of any records and, upon request by EPA or DOJ, Settling Defendant shall
13 deliver any such records to EPA. Settling Defendant may assert that certain records are
14 privileged under the attorney-client privilege or any other privilege recognized by federal
15 law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the
16 following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation
17 (e.g., company or firm), and address of the author of the record; 4) the name and title of
18 each addressee and recipient; 5) a description of the subject of the record; and 6) the
19 privilege asserted. If a claim of privilege applies only to a portion of a record, the record
20 shall be provided to EPA in redacted form to mask the privileged information only.
21 Settling Defendant shall retain all records that it claims to be privileged until the United
22 States has had a reasonable opportunity to dispute the privilege claim and any such dispute
23 has been resolved in Settling Defendant's favor. However, no records created or generated
24 pursuant to the requirements of this or any other settlement with the United States shall be
25 withheld on the grounds that they are privileged.

26 57. Settling Defendant hereby certifies that, to the best of its knowledge and
27 belief, after appropriate inquiry, it has not since notification of potential liability by the
28 United States or the State or the filing of suit against it regarding the Site, altered,

1 mutilated, discarded, destroyed or otherwise disposed of any records, information, or
2 reports relating to its potential liability regarding the Site which are the sole record of
3 factual information, except as such documents are destroyed or altered in
4 the ordinary course of Settling Defendants' business and in compliance with State and
5 federal law, and that no such records have been destroyed for an improper purpose.
6 Settling Defendant further certifies that it has fully complied with any and all EPA requests
7 for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e),
8 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

9 **XVII. NOTICES AND SUBMISSIONS**

10 58. Whenever, under the terms of this Consent Decree, notice is required to be
11 given or a document is required to be sent by one Party to another, it shall be directed to the
12 individuals at the addresses specified below and, as to the Settling Defendant, to the
13 individual specified by Settling Defendant as the agent authorized to accept service
14 pursuant to Section XXI, unless those individuals or their successors give notice of a
15 change to the other Parties in writing. Written notice as specified herein shall constitute
16 complete satisfaction of any written notice requirement of the Consent Decree with respect
17 to the United States, EPA, DOJ, and the Settling Defendant, respectively.

18 As to the United States:

19 As to DOJ:

20 Chief, Environmental Enforcement Section
21 Environment and Natural Resources Division
22 U.S. Department of Justice (DJ # 90-11-2-467/5)
23 P.O. Box 7611
24 Ben Franklin Station
25 Washington, D.C. 20044-7611

26 Matthew A. Fogelson
27 Trial Attorney
28 Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105

1 As to EPA:

2 Ann C. Chan
3 Assistant Regional Counsel
4 Office of Regional Counsel (ORC-3)
5 U.S. EPA, Region IX
6 75 Hawthorne Street
7 San Francisco, CA 94105

8 Shiann-Jang Chern
9 Remedial Project Manager
10 Superfund Division (SFD-7-1)
11 U.S. EPA, Region IX
12 75 Hawthorne Street
13 San Francisco, CA 94105

14 William Hanamoto
15 Policy and Management Division – Superfund Accounting
16 U.S. EPA, Region IX
17 75 Hawthorne Street
18 San Francisco, CA 94105

19 Joe Schmidt
20 Regional Financial Management Officer (PMD-5)
21 U.S. EPA, Region IX
22 75 Hawthorne Street
23 San Francisco, CA 94105

24 **XVIII. RETENTION OF JURISDICTION**

25 59. This Court shall retain jurisdiction over this matter for the purpose of
26 interpreting and enforcing the terms of this Consent Decree.

27 **XIX. INTEGRATION/APPENDICES**

28 60. This Consent Decree and its appendices constitute the final, complete, and
exclusive agreement and understanding among the Parties with respect to the settlement
embodied in this Consent Decree. The Parties acknowledge that there are no
representations, agreements, or understandings relating to the settlement other than those
expressly contained in this Consent Decree. The following appendices are attached to and
incorporated into this Consent Decree:

“Appendix A” is a map of the Property;

“Appendix B” is a map of the Site;

“Appendix C” is the SOW;

1 "Appendix D" is the Covenant to Restrict Use of Property, Environmental
2 Restriction.

3 **XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

4 61. This Consent Decree shall be lodged with the Court for a period of not less
5 than 30 days for public notice and comment and for opportunity for a public hearing
6 pursuant to Section 7003(d) of the Resources Conservation and Recovery Act, 42 U.S.C. §
7 6973(d). The United States reserves the right to withdraw or withhold its consent if the
8 comments regarding the Consent Decree disclose facts or considerations which indicate
9 that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant
10 consents to the entry of this Consent Decree without further notice.

11 62. If for any reason this Court should decline to approve this Consent Decree in
12 the form presented, this agreement is voidable at the sole discretion of any Party and the
13 terms of the agreement may not be used as evidence in any litigation between the Parties.

14 **XXI. SIGNATORIES/SERVICE**

15 63. The undersigned representative of Settling Defendant to this Consent Decree
16 and the Assistant Attorney General of the United States Department of Justice certify that
17 they are authorized to enter into the terms and conditions of this Consent Decree and to
18 execute and legally bind the Parties they represent to this document.

19 64. Settling Defendant hereby agrees not to oppose entry of this Consent Decree
20 by this Court or to challenge any provision of this Consent Decree, unless the United States
21 has notified Settling Defendant in writing that it no longer supports entry of the Consent
22 Decree.

23 65. Settling Defendant shall identify, on the attached signature page, the name
24 and address of an agent who is authorized to accept service of process by mail on its behalf
25 with respect to all matters arising under or relating to this Consent Decree. Settling
26 Defendant hereby agrees to accept service in that manner and to waive the formal service
27 requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any
28 applicable local rules of this Court, including but not limited to service of a summons. The

1 Parties agree that Settling Defendant need not file an answer to the Complaint in this action
2 unless or until the Court expressly declines to enter this Consent Decree.

3 **XXII. FINAL JUDGMENT**

4 66. Upon approval and entry of this Consent Decree by the Court, this Consent
5 Decree shall constitute the final judgment between the United States and Settling
6 Defendant. The Court finds that there is no just reason for delay and therefore enters this
7 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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9 SO ORDERED THIS ____ DAY OF _____, 2005.

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12 United States District Judge
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United
2 States v. The Newark Group, Inc., (N.D. Cal.) relating to the Lorentz Superfund Site.

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For THE UNITED STATES OF AMERICA

Date: 5/3/05

Kelly A. Johnson
KELLY A. JOHNSON

Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: _____

MATTHEW A. FOGELSON

Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
301 Howard Street
San Francisco, CA 94105

1 Date: _____

2 KEITH TAKATA
3 Director, Superfund Division
4 U.S. Environmental Protection Agency, Region IX
5 75 Hawthorne Street
6 San Francisco, CA 94105

6 Date: _____

7 ANN C. CHAN
8 Assistant Regional Counsel
9 U.S. Environmental Protection Agency, Region IX
10 75 Hawthorne Street
11 San Francisco, CA 94105

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1 For Settling Defendant THE NEWARK GROUP, INC.
2

3 Date: _____
4

5 Title: _____
6

7 Agent Authorized to Accept Service on Behalf of Above-signed Party:

8 Name: _____
9

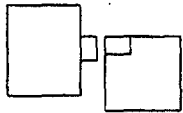
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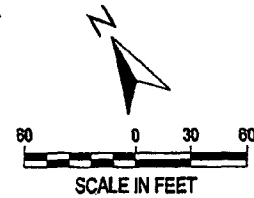
10TH STREET

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LORENTZ BARREL AND DRUM PROPERTY

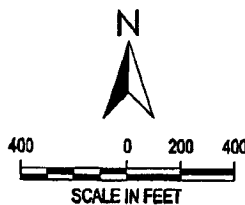
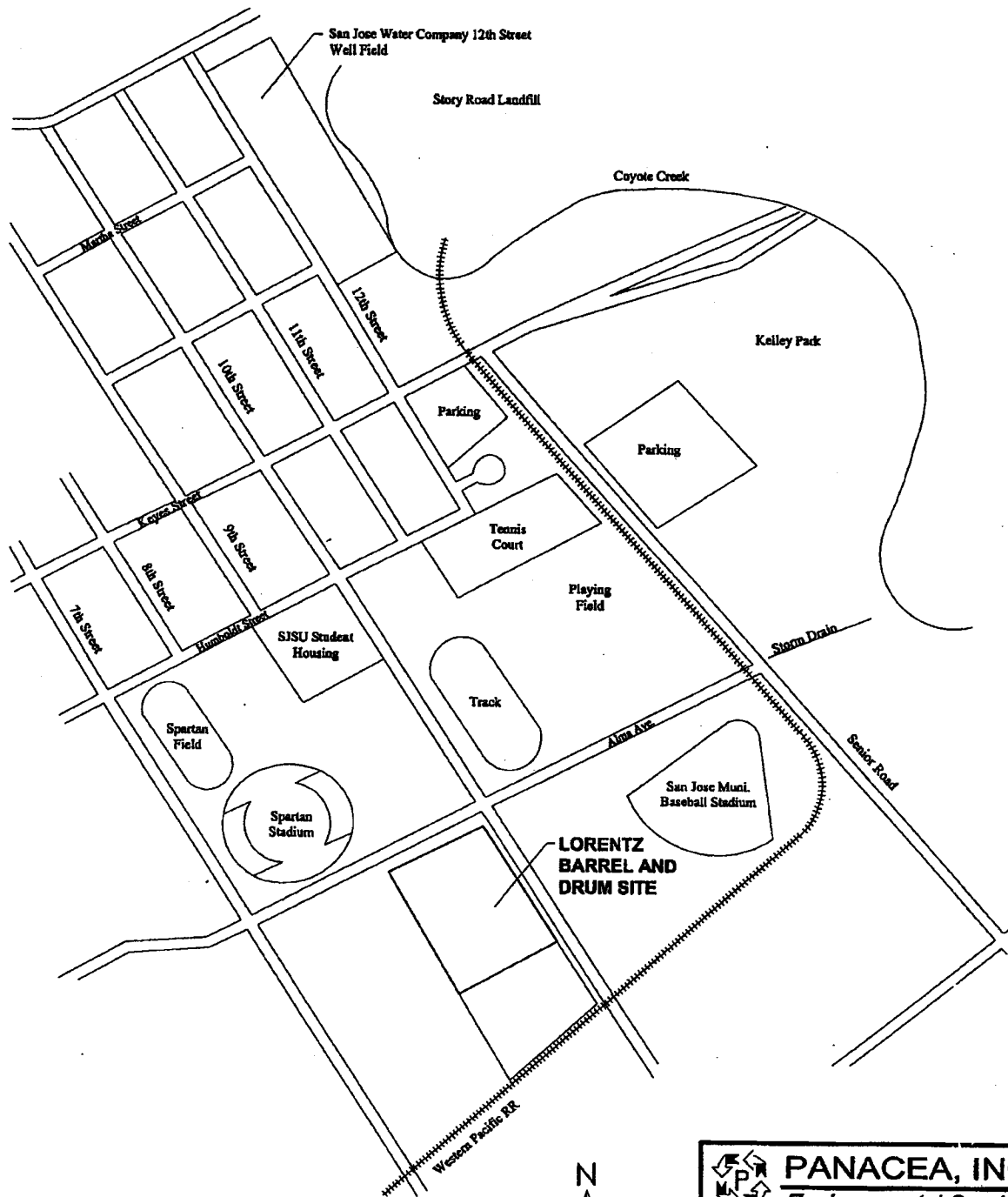



NEWARK GROUP PROPERTY



NEWARK GROUP PROPERTY
SAN JOSE, CALIFORNIA

PROJECT NO. C01- 285.4 | DATE: 01/05/05



	PANACEA, INC. <i>Environmental Services</i>	
	LORENTZ BARREL AND DRUM SITE SAN JOSE, CALIFORNIA	
	PROJECT NO. C01-285.4	DATE: 01/05/05

Consent Decree in United States v. The Newark Group (N.D. Cal.)

Appendix C

Statement of Work

Lorentz Barrel and Drum Superfund Site

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A. INTRODUCTION

This Statement of Work ("SOW") relates to the Lorentz Barrel and Drum Superfund Site in San Jose, California ("the Site"). The purpose of the SOW is to outline the tasks required of Settling Defendant by the Consent Decree, to which this SOW is appended, with respect to the approximately 1.47 acres of the Site currently owned by Settling Defendant (the "Property").

Two Records of Decision ("RODs") were issued for the Site.

ROD 1 (EPA/ROD/R09-88/023), for Site Operable Unit 2 ("OU-2"), was issued on September 21, 1988 and described the shallow groundwater remedy. An Explanation of Significant Differences ("ESD") for OU-2 was issued on April 24, 1998. The ESD explained the decision to change the shallow groundwater remedy from the combination of Ultra Violet/Oxidation Unit ("UV/OX") and Granular Activated Carbon ("GAC") to the GAC system alone.

ROD 2 (EPA/ROD/R09-93/094), for Site Operable Unit 1 (OU-1), was issued on August 26, 1993 and defined the selected remedy for the remainder of the Site. OU-1 remedial tasks included the construction of a cap at the Site, maintaining the cap, and installation and operation of a soil vapor extraction system. An ESD for OU-1 ROD was issued on May 29, 1998.

Settling Defendant shall follow ROD 2 (as amended by the ESD for ROD 2), this SOW, the Consent Decree to which this SOW is appended, and any applicable guidance, including guidance provided by Region 9 of the U.S. Environmental Protection Agency ("EPA"), in implementing the maintenance requirements with respect to the concrete and asphalt caps on the Property (hereinafter referred to as the "Caps").

In accordance with Section 121(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9621(c), EPA will review the protectiveness of the selected remedy at least once every five years. Such review will include review of institutional control measures and long term operation and maintenance of the Site remedy.

B. GENERAL PROVISIONS

1. Definitions

Unless otherwise expressly provided herein, terms used in this Statement of Work that are defined in the Consent Decree, in CERCLA or in the regulations promulgated under CERCLA shall have the meaning assigned to them in the Consent Decree, CERCLA or in such regulations.

2. EPA Approval

EPA approval of any submittals does not constitute a release of responsibility by Settling Defendant for inspections and work to be performed pursuant to this SOW.

3. Notification

Settling Defendant shall notify the CERCLA lead agency, in writing, of any future intentions to cease operations for reasons other than approved scheduled maintenance or unforeseen emergency (such as earthquake or fire), at least 14 days in advance of ceasing operations.

4. Coordination with other Federal, State, and Local Agencies

Settling Defendant shall contact all appropriate federal, state, and local agencies with regulatory authority to determine requirements related to the Property and the intended use of the Property. Settling Defendant shall furnish a copy of all correspondence and submittals relating to environmental regulatory compliance made to federal (except EPA correspondence), state, and local agencies to EPA and the California Department of Toxic Substances Control ("DTSC") in a timely manner. In addition to environmental regulatory compliance, the Settling Defendant shall provide copies of building permit applications and other permits for operation of facilities at the Property to EPA and DTSC.

5. Proposed Changes or Alterations to the Existing Concrete and Asphalt Caps

Settling Defendant must contact EPA and DTSC in the planning stage if changes in the use of the Property, construction of new buildings, modifications of the Caps, subsurface drilling/excavation, or well installation activities are planned. Settling Defendant must submit a description of the intended change to EPA and DTSC and receive written approval prior to initiating work. Depending on the nature of the proposed change, EPA and DTSC may require a submittal of detailed plans and documentation for review and approval.

C. WORK TO BE PERFORMED

1. Routine Maintenance of Concrete and Asphalt Caps

On an on-going basis:

- a. Settling Defendant shall repair or reseal the Caps in areas where the pavement has cracked.
- b. If heavy equipment will be used on any portion of the Caps, Settling

Defendant shall confirm that such portion of the Caps has adequate strength to support the loading of heavy equipment.

c. Settling Defendant shall repair any potholes, distressed areas, or other type of breach in the Caps within two weeks of the formation of such pothole or breach, regardless of the size of the pothole or breach.

d. Settling Defendant shall immediately install a temporary barrier over any pothole, distressed area, or other type of breach in the Caps and such temporary barrier must effectively prevent dust or soil migration and prevent human contact with the soils. Such temporary barriers shall remain in place until the Caps are effectively repaired. Any excavated or repaired area shall be restored to pre-excavation thickness of the concrete and/or asphalt so that the excavated or repaired area is level and flush with the surrounding Cap.

2. Inspections of Concrete and Asphalt Caps

a. Settling Defendant shall conduct a visual inspection of the Caps every (i) June, (ii) September, and (iii) in each month from October through the following March, and provide a status report ("Routine Status Report") to EPA and to DTSC within 30 days after each such visual inspection documenting, at a minimum, the condition of the Caps, including a description of any cracks, breaches or other maintenance concerns. EPA may adjust the schedule for the submission of Routine Status Reports based on the actual use of the Property and the performance of the Caps. The initial Routine Status Report shall be submitted within ninety (90) days of the Effective Date of the Consent Decree. Routine Status Reports may be submitted in electronic format.

b. One year from the Effective Date of the Consent Decree, and every two years thereafter, a complete inspection of the Property shall be made jointly by the facility manager and a qualified engineer. The joint inspection should identify any need for improvements above and beyond normal pavement maintenance which are necessary to minimize the potential for distress to the Caps with the goal of maintaining the integrity of the Caps. Settling Defendant shall submit to EPA and to DTSC a written report certified by the qualified engineer ("Joint Inspection Report") summarizing the finding of the joint inspection, including any inspection photos of the Property which should be included as necessary. At a minimum, the report shall include the field observations, conclusions, recommended work tasks and the schedule for work that shall be performed to maintain the Caps. In any month in which a Joint Inspection Report is submitted, no Routine Status Report need be submitted.

3. Emergency Maintenance of Concrete and Asphalt Caps

In the event of a catastrophic event such as an earthquake or break of subsurface utility

pipelines, Settling Defendant shall immediately conduct a thorough investigation of the Property and notify EPA and DTSC within forty-eight (48) hours after such event to discuss the condition of the Caps. Settling Defendant shall submit an incident report to EPA and DTSC within two weeks after each such event. In the event the Caps are significantly impacted, within 30 days after the event, Settling Defendant shall submit a proposal to EPA and DTSC, for review and approval, describing the actions which will be required to repair the Caps and setting forth a schedule for the repair work.

D. OTHER SUBMITTALS

Within ninety (90) days of the Effective Date of the Consent Decree, Settling Defendant shall submit a Property Maintenance Plan to both EPA and DTSC. The Property Maintenance Plan shall include a Routine Property Maintenance Section and an Emergency Response Section.

1. Routine Property Maintenance Section

The Routine Property Maintenance Section of the Property Maintenance Plan, at a minimum, shall include a map of the Property; contact information for relevant personnel; a schedule and description of inspection and maintenance work to be performed; qualifications of inspection personnel; a sample form for the Routine Status Report which should include a section for the description of any maintenance work performed since submission of the last Routine Status Report; any existing maintenance or repair records generated prior to the Effective Date of the Consent Decree; a sample form for the Joint Inspection Report; a description of record keeping practices relevant to maintenance of the Property; and health, safety, and reporting protocols with respect to repairs of the Caps. The Property Maintenance Plan should be dated and referenced by version number.

2. Emergency Response Section

The Emergency Response Section of the Property Maintenance Plan, at a minimum, shall include a description of the Property and environmental contamination; maps of the Property; names and contact information for relevant emergency response personnel (e.g. emergency contact person, Property manager, fire department, utility company); and emergency response protocol.

E. CONTACTS

Whenever under the terms of this SOW, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below:

EPA:

Mr. Shiann-Jang Chern
USEPA, Region IX, SFD-7-4
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415)-972-3268

DTSC:

Mr. Ted Parks,
California Department of Toxic Substances Control
700 Heinz Avenue, Suite 200, Building F
Berkeley, CA 94710
Telephone: (510)-540-3805

The Newark Group, Inc.

c/o Richard F. Ricci, Esq.
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, NJ 07068
(973) 597-2463

David Asher
Vice President, General Counsel and Secretary
The Newark Group, Inc.
20 Jackson Drive
Cranford, N.J. 07016

RECORDING REQUESTED BY

The Newark Group, Inc.
20 Jackson Drive
Cranford, New Jersey 07016

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control
700 Heinz Avenue, Suite 200
Berkeley, California 94710
Attention: Barbara J. Cook, P.E., Chief
Northern California-Coastal Cleanup
Operations Branch

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

COVENANT TO RESTRICT USE OF PROPERTY

ENVIRONMENTAL RESTRICTION

(Re: Northwest Portion of Lorentz Barrel and Drum Superfund Site, Assessor's Parcel
Nos. 477-09-034 and 477-09-036)

This Covenant and Agreement ("Covenant") is made by and between The Newark Group, Inc. (the "Covenantor"), the current owner of property situated in San Jose, County of Santa Clara, State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471 (c), the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code ("H&SC") section 25260. The Covenantor and the Department, collectively referred to as the "Parties", hereby agree that the use of the Property be restricted as set forth in this Covenant. The Parties further intend that the provisions of this Covenant also be for the benefit of the U.S. Environmental Protection Agency ("U.S. EPA") as a third party beneficiary.

ARTICLE I
STATEMENT OF FACTS

1.01. The Property, totaling approximately 1.60 acres is more particularly described and depicted in Exhibit "A", attached hereto and incorporated herein by this reference. The Property is located at 384 and 388 East Alma Avenue, San Jose, County of Santa Clara, State of California. This property is more specifically described as Santa Clara County Assessor's Parcel Numbers 477-09-034 and 477-09-036.

1.02. The Property is the northwest portion of the Lorentz Barrel and Drum Superfund Site ("LB&D Site"), where a drum recycling facility operated from 1947 to 1987. Improper waste handling practices during the drum recycling operation resulted in chemical contamination of the soil and groundwater at the LB&D Site. The LB&D Site was added to U.S. EPA's National Priorities List on October 4, 1989 (Site ID No. 0989; CERCLIS ID No. CAD029295706). Remediation at the LB&D Site is being conducted under the authority and supervision of the U.S. EPA.

1.03. The two parcels that comprise the Property were grant deeded in 1981 and 1984 to Arata Western, which became The Newark Group, Inc. Prior to this property transfer, a portion of the Property was used for stockpiling drums in conjunction with the operations of Lorentz Barrel and Drum. In 1991, the Property was investigated as part of the Remedial Investigation of the LB&D Site conducted by U.S. EPA. Thirty soil borings were completed on the Property to depths of approximately 5.5 feet. The results of the sampling were summarized in the report "Remedial Investigation: Addendum No. 2, Recycled Fibers, Inc. Soils Investigation Report" (RI Addendum No. 2) prepared by URS Consultants for U.S. EPA and dated June 19, 1992.

1.04. Hazardous substances, as defined in HSC section 25316, CERCLA section 101(14), and 40 Code of Federal Regulations sections 261.3 and 302.4 remain on the Property. The hazardous substances identified in RI Addendum No. 2 include: 4,4-DDT, Aroclor 1260, bis (2-ethylhexyl)phthalate, and several polynuclear aromatic hydrocarbons including benzo(a)pyrene and benzo(a)anthracene. RI Addendum No. 2

indicated that the Property had concentrations of polychlorinated biphenyls, pesticides, and semi-volatile organic compounds in soil at levels exceeding the 10^{-6} risk level, and in the case of Aroclor 1260, exceeding the 10^{-5} risk level.

1.05. The remedy selected for the LB&D Site by U.S. EPA in the Record of Decision (ROD) issued on August 26, 1993 consists of groundwater and soil vapor extraction and treatment, construction of an engineered cap on the LB&D Site, except for the area comprised by the Property, and deed restrictions. The ROD concluded that there was minimal risk since the Property was covered with concrete or asphaltic-concrete and soil was not exposed. However, the ROD also concluded that there could be health risks if the soil were to be exposed in the future. The existing pavement and buildings on the Property shall hereafter be referred to as the "Cap." The remedy chosen by U.S. EPA in the ROD required that deed restrictions be placed on and Five-Year Reviews be conducted for the LB&D Site, including the Property.

1.06. The provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions") set forth in this Covenant are necessary to preclude potential future users' exposure to hazardous substances identified in Section 1.04.

ARTICLE II DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. U.S. EPA. "U.S. EPA" means the United States Environmental Protection Agency and includes its successor agencies, if any.

2.03. Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, who at any time hold title to all or an ownership interest in, all or any portion of the Property.

2.04. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.05. CERCLA Lead Agency. "CERCLA Lead Agency" means the governmental entity having the designated lead responsibility to implement response action under the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. U.S. EPA is the CERCLA Lead Agency at the time of the recording of this instrument.

ARTICLE III GENERAL PROVISIONS

3.01. Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to H&SC section 25355.5(a)(1)(C) and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property; (c) is for the benefit of, and is enforceable by the Department; (d) is for the benefit of U.S. EPA as a third party beneficiary; and (e) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to H&SC section 25355.5(a)(1)(C), this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471 (b), all successive owners of the Property are expressly bound hereby for the benefit of the Department and U.S. EPA.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease or sublease of the Property, or any portion thereof, the owner, lessor, sublessor, assignor or other transferor shall give the buyer, lessee, sublessee, assignee or other transferor written notice that hazardous substances are located at and adjacent to the Property, as required by H&SC section 25359.7.

3.04. Incorporation into Deeds and Leases. The Restrictions set forth herein shall be incorporated by reference in each and all deeds, leases, assignments, or other transfers of all or any portion of the Property which are hereafter executed or renewed. Further, each Owner or Occupant shall include in any instrument conveying any interest in all or any portion of the Property, including but not limited to deeds, leases, and mortgages, a notice which is insubstantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTION AND COVENANT TO RESTRICT USE OF PROPERTY, RECORDED IN THE PUBLIC LAND RECORDS ON [DATE] ___, IN BOOK ___, PAGE ___, IN FAVOR OF AND ENFORCEABLE BY THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL, AND FOR THE BENEFIT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

3.05. Conveyance of Property. The Owner shall provide notice to the Department and to U.S. EPA not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessor encumbrances). The Department and U.S. EPA shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE IV **RESTRICTIONS**

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory-built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.

- (e) A public park.

4.02. Soil Management

- (a) Except as provided by Section 4.02(b) below, the Property shall not be used in such a way that will disturb or interfere with the integrity of the Cap installed at the Property.
- (b) The Property shall be used and developed in a way that preserves the integrity of the Cap, except that under the supervision of the CERCLA Lead Agency, the Cap may be removed or disturbed temporarily to install fixtures, repair or replace the Cap or install improvements on the Property. The capped soil shall not be disturbed without a Soil Management Plan and a Health and Safety Plan submitted to the CERCLA Lead Agency for review and approval.
- (c) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.
- (d) The Owner shall provide the CERCLA Lead Agency written notice at least fourteen (14) days prior to any activities which will disturb the Cap and underlying soils.

4.03. Prohibited Activities. The following activities shall not be conducted at the Property:

- (a) Raising of food (cattle, food crops), and
- (b) Extraction of groundwater for purposes other than site remediation

4.04. Non-Interference with Cap. Covenantor agrees:

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the Capped Property without prior review and approval by the CERCLA Lead Agency.
- (b) All uses and development of the Capped Property shall preserve the integrity and physical accessibility of the Cap.

- (c) The Cap shall not be altered without written approval by the CERCLA Lead Agency.
- (d) Covenantor shall notify the CERCLA Lead Agency of each of the following: (i) the type, cause, location and date of any damage to the Cap and (ii) the type and date of repair of such damage. Notification to the CERCLA Lead Agency shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Timely and accurate notification by any Owner or Occupant shall satisfy this requirement on behalf of all other Owners and Occupants.

4.05. Access for the Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment. Nothing in this instrument shall limit or otherwise affect U.S. EPA's right of entry and access, or U.S. EPA's authority to take response actions under CERCLA, the National Contingency Plan, 40 C.F.R. Part 300 and its successor provisions, or federal law.

4.06. Access for Implementing Operation and Maintenance. The entity or person responsible for implementing the Operation and Maintenance Plan shall have reasonable right of entry and access to the Property for the purpose of implementing the Operation and Maintenance Plan until the CERCLA Lead Agency determines that no further Operation and Maintenance is required.

ARTICLE V ENFORCEMENT

5.01. Enforcement. The Department shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. This Covenant shall be enforceable by the Department pursuant to H&SC, Division 20, Chapter 6.5, Article 8 (commencing with section 25180). Failure of the Covenantor, Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department to require that the Covenantor or Owner modify or remove any

improvements ("Improvements" herein shall mean all buildings, roads, driveways, and paved parking areas), constructed or placed upon any portion of the Property in violation of the Restrictions. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA, and violation of this Covenant shall be grounds for the Department to file civil or criminal actions as provided by law.

ARTICLE VI VARIANCE, TERMINATION, AND TERM

6.01. Variance. Covenantor, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with H&SC section 25233. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no variance may be granted under this paragraph 6.01 without prior review and prior concurrence of the variance by U.S. EPA. If requested by the Department or U.S. EPA, any approved variance shall be recorded in the land records by the person or entity granted the variance.

6.02. Termination. Covenantor, or any other aggrieved person, may apply to the Department for a termination of the Restrictions or other terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with H&SC section 25234. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no termination may be granted under this Paragraph 6.02 without prior review and prior written concurrence of the termination by U.S. EPA.

6.03. Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, after review and prior written concurrence by U.S. EPA, this Covenant shall continue in effect in perpetuity.

ARTICLE VII
MISCELLANEOUS

7.01. **No Dedication or Taking.** Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever. Further, nothing set forth in this Covenant shall be construed to effect a taking under state or federal law.

7.02. **Department References.** All references to the Department include successor agencies/departments or other successor entity.

7.03. **Recordation.** The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Santa Clara within ten (10) days of the Covenantor's receipt of a fully executed original.

7.04. **Notices.** Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (i) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (ii) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner:

[contact person's name]
The Newark Group, Inc.
20 Jackson Drive
Cranford, New Jersey 07016

To Department:

Barbara J. Cook, P.E., Chief
Department of Toxic Substances Control
Northern California - Coastal Cleanup Operations Branch
700 Heinz Avenue, Suite 200
Berkeley, California 94710

To U.S. EPA:

U.S. EPA, Region IX
Re: Lorentz Barrel & Drum Superfund Site
CERCLIS: CAD029295706
Attn: Loren Henning
75 Hawthorne Street, SFD-7-4
San Francisco, California 94105-3901

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. **Partial Invalidity.** If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant, or the application of such portions to persons or circumstances other than those to which it is found to be invalid, shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06. **Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

7.07. **Third Party Beneficiary.** U.S. EPA's right as a third party beneficiary of this Covenant shall be construed pursuant to principles of contract law under the statutory and common law of the State of California.

7.08. **Statutory References.** All statutory references include successor provisions.

IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor:

By: _____

Date: _____

Title:

The Newark Group, Inc.

Department of Toxic Substances Control:

By: _____

Date: _____

Title: Barbara J. Cook, Chief

Northern California-Coastal Cleanup Operations Branch

STATE OF CALIFORNIA

COUNTY OF (_____)

On this _____ day of _____, in the year _____,
before me _____, personally appeared
_____, personally known to me (or proved
to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is /are
subscribed to the within instrument and acknowledged to me that he/she/they executed
the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s)
on the instrument the person(s), or the entity upon behalf of which the person(s) acted,
executed the instrument.

WITNESS my hand and official seal.

Signature _____